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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MR. ROBERT W. CASSANO,)	Case No. CV 10-2913-PSG (DTB)
Petitioner,)	
vs.)	ORDER TO SHOW CAUSE
JOHN F. SALAZAR, Warden, et)	
al.,)	
Respondent.)	

On April 20, 2010, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody herein. Petitioner purports to be challenging the sentence he received in Los Angeles County Superior Court on January 15, 2008 following petitioner's conviction pursuant to a plea bargain agreement.

Since this action was filed after the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") on April 24, 1996, it is subject to the AEDPA's one-year limitation period, as set forth at 28 U.S.C. § 2244(d). See Calderon v. United States District Court for the Central District of California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997).¹ 28 U.S.C. § 2244(d)

¹ Beeler was overruled on other grounds in Calderon v. United States (continued...)

1 provides:

2 “(1) A 1-year period of limitation shall apply to an application
3 for a writ of habeas corpus by a person in custody pursuant to the
4 judgment of a State court. The limitation period shall run from the latest
5 of--

6 (A) the date on which the judgment became final by
7 conclusion of direct review or the expiration of the time for
8 seeking such review;

9 (B) the date on which the impediment to filing an
10 application created by State action in violation of the Constitution
11 or laws of the United States is removed, if the applicant was
12 prevented from filing by such State action;

13 (C) the date on which the constitutional right asserted
14 was initially recognized by the Supreme Court, if the right has
15 been newly recognized by the Supreme Court and made
16 retroactively applicable to cases on collateral review; or

17 (D) the date on which the factual predicate of the claim
18 or claims presented could have been discovered through the
19 exercise of due diligence.

20 (2) The time during which a properly filed application for State
21 post-conviction or other collateral review with respect to the pertinent
22 judgment or claim is pending shall not be counted toward any period of
23 limitation under this subsection.”
24

25 Under California law in effect at the time of petitioner’s conviction, an appeal
26

27 ¹(...continued)

28 District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

1 had to be filed within 60 days after the rendition of the judgment. See Cal. Rules of
2 Court, Rule 30.1(a). Where the judgment of conviction was entered upon a guilty
3 plea, the defendant was required to file a notice of intended appeal within the 60-day
4 period, accompanied by a statement “showing reasonable constitutional, jurisdictional,
5 or other grounds going to the legality of the proceedings”; the appeal did not become
6 operative unless and until the trial court executed and filed a certificate of probable
7 cause for appeal. See Cal. Rules of Court, Rules 31(b) and (d); see also Cal. Penal
8 Code § 1237.5. Consequently, “the date on which the judgment became final by
9 conclusion of direct review or the expiration of the time for seeking such review” here
10 was March 17, 2008, when petitioner’s time to file a notice of intended appeal
11 expired.

12 Therefore, for purposes of 28 U.S.C. § 2244(d)(1)(A), petitioner’s judgment of
13 conviction “became final by conclusion of direct review or the expiration of the time
14 for seeking such review” on March 17, 2008, and his one-year limitations period
15 under the AEDPA expired on March 17, 2009, absent either a late-trigger date or a
16 basis for tolling of the statute.

17 From the face of the Petition, it does not appear that petitioner has any basis for
18 contending that he is entitled to a later trigger date under § 2244(d)(1)(B). In addition,
19 it is clear that petitioner has no basis for contending that he is entitled to a later trigger
20 date under § 2244(b)(1)(D) since petitioner was aware of the **factual** predicate of each
21 of his claims as of the date he was convicted and sentenced. See Hasan v. Galaza, 254
22 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins to run when a
23 prisoner “knows (or through diligence could discover) the important facts, not when
24 the prisoner recognizes their legal significance”).

25 Thus, unless a basis for tolling the statute existed, petitioner’s last day to file
26 his federal habeas petition was March 17, 2009. See Patterson v. Stewart, 251 F.3d
27 1243, 1246 (9th Cir. 2001); Beeler, 128 F.3d at 1287-88.

28 28 U.S.C. § 2244(d)(2) provides:

1 “The time during which a properly filed application for State post-
2 conviction or other collateral review with respect to the pertinent
3 judgment or claim is pending shall not be counted toward any period of
4 limitation under this subsection.”
5

6 In the Petition, petitioner indicates he filed three collateral challenges to his
7 conviction in state court: A habeas petition in the Los Angeles County Superior Court
8 on October 13, 2009; a habeas petition in the California Court of Appeal on October
9 26, 2009; and a habeas petition in the California Supreme Court on October 14, 2009.
10 (See Pet. at ¶ 6).

11 In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), the Ninth Circuit construed
12 the foregoing tolling provision with reference to California’s post-conviction
13 procedures. The Ninth Circuit held that “the statute of limitations is tolled from the
14 time the first state habeas petition is filed until the California Supreme Court rejects
15 the petitioner’s final collateral challenge.” See id. at 1006. Accord, Carey v. Saffold,
16 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (holding that, for
17 purposes of statutory tolling, a California petitioner’s application for collateral review
18 remains “pending” during the intervals between the time a lower state court denies the
19 application and the time the petitioner files a further petition in a higher state court).
20 However, the statute of limitations is not tolled during the interval between the date
21 on which the judgment of conviction became final and the filing of the petitioner’s
22 first collateral challenge. See Nino, 183 F.3d at 1006.

23 Here, petitioner’s first collateral challenge was not filed until on or about
24 October 13, 2009. By then, the one-year limitation period already had lapsed and
25 could not be reinitiated. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)
26 (holding that § 2244(d) “does not permit the reinitiation of the limitations period that
27 has ended before the state petition was filed,” even if the state petition was timely
28 filed); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264

1 F.3d 894, 898-99 (9th Cir. 2001); Green v. White, 223 F.3d 1001, 1003 (9th Cir.
2 2000).

3 The Ninth Circuit has held that the district court has the authority to raise the
4 statute of limitations issue *sua sponte* when untimeliness is obvious on the face of the
5 petition and to summarily dismiss a petition on that ground pursuant to Rule 4 of the
6 Rules Governing Section 2254 Cases in the United States District Courts, so long as
7 the court “provides the petitioner with adequate notice and an opportunity to respond.”
8 See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook, 260 F.3d
9 1039, 1042-43 (9th Cir. 2001).

10 IT THEREFORE IS ORDERED that, on or before **May 21, 2010**, petitioner
11 show cause in writing, if any he has, why the Court should not recommend that this
12 action be dismissed with prejudice on the ground of untimeliness. If petitioner intends
13 to rely on the equitable tolling doctrine, he will need to include with his response to
14 the Order to Show Cause a declaration under penalty of perjury stating facts showing
15 (1) that “extraordinary circumstances” beyond petitioner’s control made it impossible
16 for him to file the Petition on time, and (2) that he has been
17 pursuing his rights diligently. See Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct.
18 1807, 1814, 161 L. Ed. 2d 669 (2005); see also Beeler, 128 F.3d at 1287-89; Miles v.
19 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).

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21 DATED: April 28, 2010

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25 DAVID T. BRISTOW
26 UNITED STATES MAGISTRATE JUDGE
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